**U.S. Department of Labor**

Board of Alien Labor Certification Appeals
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**Issue Date: 21 March 2006**

**BALCA Case No.: 2005-INA-00177**
ETA Case No.: P2002-AZ-09536051

*In the Matter of:*

**THERM-O-ROCK WEST, INC.,**
*Employer,*

*on behalf of*

**SALVADOR TORRES LUPERCIO,**
*Alien.*

Appearance: Marshall G. Whitehead, Esquire
Phoenix, Arizona
*For the Employer and the Alien*

Certifying Officer: Martin Rios
San Francisco, California

Before: **Burke, Chapman, and Vittone**[1]
Administrative Law Judges

# DECISION AND ORDER

**PER CURIAM.** This case arises from an application for alien labor certification filed by Therm-O-Rock West ("Employer") on behalf of Salvador Torres Lupercio ("Alien") for the position of "Forklift Operator." Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20,

[1] Associate Chief Administrative Law Judge Thomas M. Burke did not participate in this matter.

Part 656 of the Code of Federal Regulations.[2] We base our decision on the record upon which the Certifying Officer ("CO") denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments of the parties. 20 C.F.R. § 656.27(c).

## STATEMENT OF THE CASE

On April 30, 2001, the Employer filed an application for labor certification on behalf of the Alien, seeking to fill the position of "Forklift Operator." The minimum requirement for the position was two years of experience in the job offered, and the position was contingent upon passing an employer-given forklift operation exam. The job duties included using a forklift to move pallets around the plant and to load and unload trucks. (AF 50-72). The Employer requested reduction in recruitment ("RIR") processing.

On August 7, 2003, the CO issued a Notice of Findings ("NOF") proposing to deny labor certification on two bases. The CO found that the Employer's requirement of two years of experience in the job offered was an unduly restrictive job requirement, when three months of experience is the maximum required of a forklift operator according to the Dictionary of Occupational Titles, Code 921.683-050. The CO also found that the Employer failed to provide specificity in its rejection of all 141 applicants. The Employer interviewed three candidates but gave only general reasons why they did not meet the minimum qualifications. The CO instructed

[2] This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004).

the Employer to give a detailed explanation as to why all 141 applicants were rejected. (AF 17-19).

On September 8, 2003, the Employer filed a rebuttal electing to take the corrective action of amending the restrictive requirement to three months of experience and retesting the labor market. The Employer explained that the applicants not interviewed were rejected due to lack of experience or a requirement of greater wages. (AF 15-16). On September 12, 2003, the application was remanded to the State of Arizona for a retesting of the labor market. (AF 36).

Following supervised recruitment on remand, the CO issued a NOF on May 26, 2004 proposing to deny labor certification.[3] The CO noted that applicants Scott and Braun appeared to meet the minimum requirement of three months of experience as a forklift operator. The CO stated that the Employer's rejection of Scott, because he had no outside work experience, and Braun, because he had six employers in three years, was unlawful. The Employer was instructed to rebut the finding by furnishing documentation as to why each U.S. applicant had been rejected for lawful, job-related reasons. (AF 46-48).

On June 28, 2004, the Employer filed a rebuttal arguing that it did not unlawfully reject U.S. workers. The Employer attested that in its experience only applicants with previous outside work experience remained long-term due to the extreme heat of the outside work. It also argued that Braun's history reflected that he was not a likely long-term employee because he could not

[3] The NOF states that the RIR was approved, but goes on to cite deficiencies in the application. Since the matter was processed under state supervision on remand, however, the RIR application was irrelevant.

hold a job for longer than six months. The Employer indicated a willingness to retest the labor market. (AF 37-45).

On July 7, 2004, the CO issued a Final Determination denying labor certification. The CO stated that the Employer's rebuttal did not provide objective documentation to support its subjective opinions that Scott would be unable to perform job duties outside the warehouse or that Braun would not remain with the company beyond six to twelve months. Accordingly, the CO determined that the Employer did not provide lawful job-related reasons for rejecting the U.S. applicants. (AF 12-14).

By letter dated August 9, 2004, and entitled "Final Determination Response" the Employer submitted additional evidence and argument to the CO. (AF 1-11). On August 12, 2004, the CO denied reconsideration and stated that it would forward the matter to the Board of Alien Labor Certification Appeals ("BALCA" or the "Board"). (AF 11).

The Board docketed the case on July 5, 2005. The Employer filed a statement of position, again asserting that it has encountered difficulty in securing long-term employees due to problems with the extremity of the heat and with employees who had inconsistent employment backgrounds.[4]

[4] It is not clear that the Employer actually requested BALCA review before the CO, as the "Final Determination Response" may have been only a motion for reconsideration. Nonetheless, given the Employer's filing of a statement of position with this Board, we will proceed to decide this matter on the merits.

## DISCUSSION

Twenty C.F.R. § 656.24(b)(2)(ii) states, in part, that the CO shall consider a U.S. worker able and qualified for the job opportunity if the worker, by education, training, experience, or a combination thereof, is able to perform in the normally acceptable manner, the duties involved in the occupation as customarily performed by other workers similarly employed. Twenty C.F.R. §656.21(b)(6) provides that U.S. workers applying for a job opportunity offered to an alien may be rejected solely for lawful job related reasons. Twenty C.F.R. § 656.20(c)(8) requires that the job opportunity be clearly open to any qualified U.S. worker.

In the instant case, the Employer rejected both U.S. applicants, based upon their resumes alone, under the speculation that they would not prove to be long-term employees. The Board has held that an employer may not reject a U.S. worker solely because he or she fears that they may not stay in the position for long. *World Bazaar*, 1988-INA-54 (June 14, 1989) (*en banc*). *See also IPF Int'l, Inc.*, 1994-INA-586 (July 24, 1996); *Integrated Business Solutions, Inc.*, 1994-INA-209 (June 22, 1995).

Both applicants appear qualified based upon their resumes. As noted by the CO, applicant Scott is forklift certified with over three years of experience and applicant Braun has experience operating seven types of forklifts. (AF 21-23). Employer has provided no objective evidence to support its assertion that applicants Scott and Braun are unqualified. Employer's argument that the combination of extremely high furnace temperatures and the Arizona summer temperatures requires that he hire individuals accustomed to working in an outdoor environment

does not objectively show that applicant Scott would be unable to perform the job duties. Labor certification is properly denied where an employer has rejected a U.S. worker who meets the stated minimum requirements for the job. *Sterik Co.*, 1993-INA-252 (Apr. 19, 1994). Accordingly, the CO properly denied labor certification.

## ORDER

The Final Determination of the Certifying Officer denying labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board
of Alien Labor Certification Appeals

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW**: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400 North
Washington, D.C., 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.